No. 82-1994

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

**KIRBY FOREST INDUSTRIES, INC.,**

***Petitioner,***

*vs.*

**UNITED STATES OF AMERICA,**

***Respondent.***

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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# BRIEF OF AMICUS CURIAE LAUGHLIN RECREATIONAL ENTERPRISES, INC. IN SUPPORT OF PETITIONER

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**DONALD S. WOOD, ESQ.**
2525 West Charleston Boulevard
Las Vegas, Nevada 89102

**JERROLD A. FADEM**
**MICHAEL M. BERGER**
**of FADEM, BERGER & NORTON**
501 Santa Monica Boulevard
Suite 600
P.O. Box 2148
Santa Monica, CA 90406
(213) 451-9951

***Attorneys for Amicus Curiae***

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## INTEREST OF AMICUS CURIAE

With the consent of the parties, Laughlin Recreational Enterprises, Inc. (Laughlin) files this Amicus Curiae Brief in support of the Petitioner. The letters of consent are filed with the Clerk.

Laughlin has a condemnation case pending in the Ninth Circuit Court of Appeals, in which a 320 acre parcel of Laughlin's property is being acquired to enlarge the Lake Mead National Recreational Area. (*U.S. v. 319.88 Acres*, 9th Cir. No. 83-2080)

Like the case at bench, *319.88 Acres* is a "straight" condemnation under 40 USC §257. Pre-trial possession was not sought. There was considerable delay between the filing of the complaint and recording of a lis pendens in October 1976 and the entry of judgment in April 1983. The judgment has not yet been paid. The property is in a natural state and the United States wants to keep it that way.

As in the case at bench, the District Judge believed that the pendency of the suit and Laughlin's consequent inability to make any use of the property had injured Laughlin.

However, because of a belief that 40 USC §257 gives the United States the right to back out of the acquisition at any time before the judgment is paid, the District Judge felt that Congress had forbidden the award of pre-judgment interest to compensate for that injury.

The appeal from the portion of the judgment denying interest is awaiting argument before the Ninth Circuit. It was set to be orally argued on December 16, 1983. However, on motion of the United States, the matter was taken off calendar pending this Court's determination of the case at bench.

Because Laughlin's case will be significantly influenced, if not determined, by the decision at bench, the parties agreed that Laughlin could file this Amicus Curiae brief, seeking to amplify the analysis in support of the Petitioner.

## SUMMARY OF ARGUMENT

This Court has been no stranger to "the taking issue" in recent years. Generically, the issue is whether actions of a government agency have so encroached on the rights of private property owners that the property has been taken, requiring compensation under the Fifth and Fourteenth Amendments.

The cases recently addressed by this Court have been regulation cases, where a police power regulation is claimed to have effected a taking either by restricting the owner's ability to use the property (*Penn Central Transp. Co. v. City of New York* [1978] 438 U.S. 104; *Agins v. City of Tiburon* [1980] 447 U.S. 255; *San Diego Gas & Elec. Co. v. City of San Diego* [1981] 450 U.S. 621) or by permitting others to use the property (*Kaiser-Aetna v. United States* [1979] 444 U.S. 164; *Pruneyard Shopping Center v. Robins* [1980] 447 U.S. 74; *Loretto v. Teleprompter Manhattan CATV Corp.* [1982] 458 U.S. 419, 73 L.Ed. 2d 868).

This case presents a different aspect of the taking issue — one equally deserving of this Court's attention.

The issues here focus on the situation where a government agency decides to acquire undeveloped private property for preservation in its natural state, announces its intention, files suit to condemn, stultifies the use of the property by its announced intention and pending suit to condemn, and then leaves the property owner helplessly — and ever so slowly — twisting in the wind, awaiting payment of his Constitutionally promised just compensation.

This Court has not directly addressed this aspect of condemnation delay. It has, however, held that compensation in the form of pre-judgment interest must be paid where payment is delayed after pre-trial possession is taken. (E.g., *Jacobs v. United States* [1933] 290 U.S.

13, 16-17; *Seaboard Air Line R. Co. v. United States* [1923] 261 U.S. 299, 306; *Shoshone Tribe v. United States* [1937] 299 U.S. 476, 497.) And other courts have held that compensation for condemnation delay is Constitutionally mandated. (E.g., *United States v. 15.65 Acres* [9th Cir. 1982] 689 F.2d 1329, 1334; *Foster v. City of Detroit* [6th Cir. 1968] 405 F.2d 138, *affirming* [E.D. Mich. 1966] 254 F.Supp. 655.)

This court has also held that whether the actions of a government agency have de facto taken property must be examined on a case-by-case basis to determine the impact of the government activity on the property owner. (E.g., *Loretto*, 458 U.S. at ____, 73 L.Ed.2d at 876; *Penn Central*, 438 U.S. at 124.) Physical invasion has expressly been held not to be required. (*Penn Central*, 438 U.S. at 122, fn. 25.) Nor can any legislative action determine what a taking is, or the measure of Constitutionally mandated just compensation. (*Monongahela Navigation Co. v. U.S.* [1893] 148 U.S. 312, 327; *Seaboard*, 261 U.S. at 306)

The Fifth Circuit in the case at bench (and the District Court in Laughlin's case) disregarded these fundamental precepts and held that Congress, by enacting 40 USC §257 and giving the United States the option to "... back out of the project up until the date of payment..." (*U.S. v. 2,175.86 Acres* [5th Cir. 1983] 696 F.2d 351, 356) has decreed that there is no "taking" until payment is tendered.

This Court's attention is needed to relieve the plight of owners of undeveloped land who are prevented by the pendency of condemnation proceedings from making any use of their land. The concept of compensation for a temporary taking, developed in Justice Brennan's four-

Justice dissenting opinion in *San Diego Gas & Elec. Co.*[1] seems eminently adaptable to the period which preceeds payment.

**WHETHER THERE HAS BEEN A DE FACTO TAKING OF PROPERTY REQUIRES EXAMINATION OF THE FACTS. IT CANNOT BE DETERMINED BY CONGRESSIONAL FIAT OR AGENCY WHIM**

"De facto taking" is a common sense concept applied where the actions of a government agency interfere so significantly with a property owner's ability to use his property that the property is adjudged to have been taken by the governmental action. In such a circumstance, the taking is held to have occurred de facto even though legal title has not passed and even though a condemnation action may not yet have been filed. (See *2 Nichols on Eminent Domain* [3d ed. 1975] §6.3, p. 6-65.)

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[1]As this Court may be aware, because of Justice Rehnquist's concurring opinion in *San Diego Gas & Elec. Co.*, other courts have generally acknowledged Justice Brennan's dissent as expressing the views of a majority of this Court on the substantive law discussed. *Hernandez v. City of Lafayette* (5th Cir. 1981) 643 F.2d 1188, 1199-1200; *Devines v. Maier* (7th Cir. 1981) 665 F.2d 138, 152; *Barbian v. Panagis* (7th Cir. 1982) 694 F.2d 476, 482, fn. 5; *In re Aircrash in Bali* (9th Cir. 1982) 684 F.2d 1301, 1311, fn. 7; *Martino v. Santa Clara Valley Water Dist.* (9th Cir. 1983) 703 F.2d 1141, 1148; *Fountain v. Metro Atlanta Rapid Transit Authority* (11th Cir. 1982) 678 F.2d 1038, 1043; *Burrows v. City of Keene* (NH 1981) 432 A.2d 15, 20; *Pratt v. State* (Minn. 1981) 309 NW 2d 767, 774; *Rippley v. City of Lincoln* (ND 1983) 330 NW 2d 505, 510; *Zinn v. State* (Wis 1983) 334 NW 2d 67, 72; *Kinzli v. City of Santa Cruz* (ND Cal 1982) 539 F.Supp. 887, 896; *Sheerr v. Township of Evesham* (NJ Super 1982) 445 A.2d 46. But see *Citadel Corp. v. Puerto Rico Highway Auth.* (1st Cir. 1982) 695 F.2d 31, 33, fn. 4.

In deciding whether the Fifth and Fourteenth Amendments command a finding that a taking has occurred de facto and compensation must be paid, this Court described the task of the judiciary as:

> ". . . determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. [Citation]" (*Penn Central*, 438 U.S. at 124)

By definition, to determine whether a taking (or anything else) is accomplished "de facto," the facts must be examined with an open mental attitude to determine whether that which is forbidden to be done directly has been accomplished covertly.[2]

Indeed, in making decisions regarding de facto happenings in other contexts, it is plain that this Court has insisted on examining the underlying facts and their impact on the parties. (E.g., *Board of Education v. Harris* [1979] 444 U.S. 130 [de facto segregation]; *U.S. v. Citizens and Southern Nat'l Bank* [1975] 422 U.S. 86 [de facto branch banks]; *Hughes Tool Co. v. TWA* [1973] 409 U.S. 363 [de facto corporate control]; *Griffin v. Illinois* [1956] 351 U.S. 12 [de facto denial of appeal rights].)

In the property context, Justice Brennan aptly summed up the rule in his four-Justice dissenting opinion in *San Diego Gas & Elec. Co.*, 450 U.S. at 652-653:

> "But 'the Constitution measures a taking of property not by what a State says, or by what it

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[2]In the words of Justice Frankfurter, the Constitution proscribes ". . . sophisticated as well as simple-minded . . ." depredations. (*Lane v. Wilson* [1939] 307 U.S. 268, 275)

> intends, but by what it does.' [Citations.] It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property. [Citations.]"

The factors which must be examined to determine the existence of a de facto taking are the economic impact of the governmental action on the property owner, the extent to which the governmental action interferes with reasonable, investment-backed expectations, and the character of the governmental action. (*Loretto,* 458 U.S. at ____, 73 L.Ed.2d at 876; *Penn Central,* 438 U.S. at 124)

In cases like this one (or Laughlin's), the facts demonstrate that a de facto taking can occur long before the de jure passage of title (which follows payment of the judicially determined just compensation). Please recall that in this class of cases:

- the property is undeveloped;
- the United States wants to acquire the property to retain it in its natural condition;
- a condemnation complaint is filed and a lis pendens recorded, giving constructive notice to the world that the property is being acquired for preservation; and
- the pendency of the condemnation proceeding destroys the property owner's ability to use, sell, lease, or even borrow on the security of the property.

Compare these facts with this Court's criteria for a de facto taking:

- The economic impact on the property owner is devastating. The property can neither be put to any use nor sold to others.
- The interference with reasonable, investment-backed expectations is total. Property is purchased with the expectation that it can either be used or sold. Even buying property as an "investment" implies that the owner needs to be able to sell it when he sees fit. The pendency of a condemnation action frustrates such expectations.
- The character of the governmental action is property acquisition. To the extent the government needs to forbid the use and marketability of the property while deciding whether to buy it, the burden of paying for that stultification should be on the government, not the hapless owner.

Applying this Court's *Loretto/Penn Central* analysis, these facts show a de facto taking. In *U.S. v. General Motors* (1945) 323 U.S. 373, this Court defined property as ". . . the right to possess, use and dispose of [a thing]." (323 U.S. at 378) In *Kaiser Aetna*, this Court held that governmental "removal" of one important "stick" in the bundle of property rights (there, the right to exclusive possession) is a de facto taking. (444 U.S. at 176; cf *Loretto*, 458 U.S. at ____, 73 L.Ed.2d 822) In this class of cases, the rights of use and disposition are plainly removed from the property owner's bundle.

## UNDEVELOPED PROPERTY IS DE FACTO TAKEN WHEN CONDEMNATION TAKES YEARS TO CONCLUDE

Owning undeveloped land is not the same as owning land which is improved and producing income.

When income-producing property is condemned, the owner remains able to use it until the condemnor obtains a right to possession. While his ability to sell it may be hampered, the pending acquisition does not deprive him of all use, as his income continues.

By contrast, when undeveloped land is condemned, and the governmental intent is to preserve it in a state of nature, the owner is left holding a very empty bag. He can neither sell or rent it to another nor borrow on its security. As the lengthy proceedings at bench demonstrate, no wise person wants to buy a participant's seat at a condemnation trial. (See *Miller v. U.S.* [Ct. Cl. 1980] 620 F.2d 812, 839; *Drakes Bay Land Co. v. U.S.* [Ct. Cl. 1970] 424 F.2d 574, 586.) The filing of the complaint (particularly when accompanied by the recording of a lis pendens, as occurred at bench and in Laughlin's case) gives notice that the property is slated for acquisition and preservation, thus destroying any market for it.[3]

Even holding undeveloped property as an investment (or for "speculation," as some pejoratively characterize it) means more than owning it until it hypothetically reaches its maximum value. It means being *able* to sell it

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[3]The crippling impact of a lis pendens has been noted judicially. Its presence has contributed to findings of taking (See *Martino,* 703 F.2d at 1147; *Foster v. City of Detroit* [ED Mich 1966] 254 F.Supp. 655, 662, *aff'd* [6th Cir. 1968] 405 F.2d 138; *Thomas W. Garland, Inc., v. City of St. Louis* [8th Cir. 1979] 596 F.2d 784, 789; *Board of Education v. Clarke* [Mich.App. 1979] 280 NW 2d 574, 576.)

*when* one's needs or wisdom dictate. The filing of a condemnation action transforms the property into an exceedingly illiquid asset.[4]

The Ninth Circuit understands that. (*U.S. v. 15.65 Acres* [9th Cir. 1982] 689 F.2d 1329, 1334; *U.S. v. 156.81 Acres* [9th Cir. 1982] 671 F.2d 336, 339) The Fifth Circuit does not. (*U.S. v. 2,175.86 Acres* [5th Cir. 1983] 696 F.2d 351, 357; but see the dissenting opinion of Judge Jolly, 696 F.2d at 358-359.)

Those state courts which have examined the subject agree with the Ninth Circuit. In addition to *State v. Nordstrom* (NJ 1969) 253 A.2d 163 and *Stewart & Grindle, Inc. v. State* (Alas 1974) 524 P.2d 1242, discussed in the Petitioner's brief on the merits, see *Lange v. State* (Wash. 1976) 547 P.2d 282 and *Osborn v. City of Cedar Rapids* (Iowa 1982) 324 NW 2d 471. As the Washington Supreme Court explained in *Lange*, 547 P.2d at 287-288:

> "Such a result was clearly foreseeable in this situation because the property was vacant and in the process of being developed. Appellant Lange had been engaged for 25 years in the business of developing real property for residential building sites. Prior to any knowledge of the highway project on the part of appellant or the public, appellant had his property annexed to the local sewer district, undertook to survey and grade streets over a portion of the tract, and imposed by deed conveyance on all of the land, mutual easements for sewer, water, and access. Given

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[4]Indeed, there is nothing fanciful in comparing it to the "white elephant" of regal Siam. Like the elephant, the undeveloped property requires care and feeding (in the form of mortgage, tax, and liability insurance payments), but produces no useful return.

appellant's business, his property was akin to an inventory of goods. In these respects, *appellant occupies a position different from that of the typical owner of a house or store which is the subject of condemnation activity.* The home or store owner does not purchase the land with the sole objective of developing and marketing the land and will not take major steps to accomplish this objective. The impairment of marketability, financing, and income is not as clearly foreseeable in such circumstances. *The home or store owner may suffer from a general market decline but his sole purpose is not destroyed,* since he may continue to use the property, derive some income or benefit from it, and thus moderate the market decline. [Citation] . . .

"In this case, *the effect of the condemnation activity was to chain appellant to his land in a falling real estate market.* Once the state manifested its unequivocal intent to appropriate the Lange property *appellants were precluded from exercising their business judgment and selling the property before the market fell further.* Moreover, appellants were precluded from taking any steps to counteract the market decline by making improvements on the land or otherwise changing its use. Thus, *appellants were deprived of the most important incidents of ownership, the rights to use and alienate property.* In addition, because the condemnation did in fact take place, appellants were prevented from holding their property, as other owners would be able to do, until economic conditions improved and market values rose again." (Emphasis added.)

The reality of the situation confronting the owner of undeveloped land during proceedings to acquire it for park or wilderness purposes was aptly summarized by the Court of Claims in *Drakes Bay Land Co. v. U.S.* (Ct. Cl. 1970) 424 F.2d 574, 586:

> "Thus plaintiff remains without a market for its land. *The private sector is not interested, understandably, because of the well publicized threat of eventual condemnation of seashore realty.* The public sector, namely the National Park Service, is not interested because after having successfully thwarted plaintiff's subdivision plans, it realizes that plaintiff is a party who can be deferred interminably, and dealt with at pleasure." (Emphasis added.)

When undeveloped land is being condemned, the owner suffers from delay in ways which differ significantly from the owner of income-producing property. The compensation rules mandated by the Constitution ought to acknowledge the difference.

**THE PERIOD DURING WHICH THE UNITED STATES IS PERMITTED TO "TEST THE WATER" AND "BACK AWAY" FROM THE ACQUISITION IF IT DOESN'T LIKE THE PRICE CAN BE VIEWED AS A TEMPORARY TAKING.**

The Fifth Circuit in the case at bench (and the District Court in Laughlin's case) have an unduly rigid view of the judiciary's duty to ensure that just compensation is paid. Their theory that 40 USC §257 precludes any award of pre-judgment interest conflicts with this Court's holdings that legislation cannot inhibit the judicial determination of just compensation (*Seaboard*, 261 U.S. at 306; *Monongahela*, 148 U.S. at 327), and that the foundation of all

condemnation law is fairness (*U.S. v. Fuller* [1973] 409 U.S. 488, 490; *U.S. v. Virginia E & P Co.* [1961] 365 U.S. 624, 631).

The Ninth Circuit knows better:

> "The great advantage to the government of proceeding under 40 U.S.C. §257 is that it can obtain a judicial valuation of the property without committing itself to condemn it. [Citations.] *This flexibility must be harmonized with the just compensation requirement.*" (*U.S. v. 156.81 Acres* [9th Cir. 1982] 671 F.2d 336, 339; emphasis added.)

The Ninth Circuit's flexible approach seems required by the settled precept that statutes are to be interpreted in harmony with the Constitution, to provide compensation for a taking. (*Phelps v. U.S.* [1927] 274 U.S. 341, 344; *Miller v. U.S.* [Ct. Cl. 1980] 650 F.2d 812, 837-838) By contrast, the Fifth Circuit's rigid approach in the case at bench makes 40 USC §257 unconstitutional by precluding compensation for a taking.

One way to harmonize 40 USC §257 with the just compensation requirement is to view as a temporary taking the period before judgment during which the property owner is deprived of the benefits of ownership.

A good analytical starting point is Justice Brennan's four-Justice dissenting opinion in *San Diego Gas & Elec. Co.*

*San Diego Gas & Elec. Co.* dealt with a taking effected by an overly stringent land use regulation. Justice Brennan expressed the view that the government be given the option of rescinding the regulation and paying compensation for a temporary taking if it did not like the alternative of retaining the regulation and buying the property.

The reason behind the theory was the Constitutional requirement of fairness:

> "If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,' it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it. The payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken. [Citations.]
>
> "The fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.' Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory. This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent irreversible 'takings.' " (450 U.S. at 656-657)

The facts at bench are that the government has stultified the use of property by the pendency of a condemnation action in order to permit the government the option of buying the property if it finds the just compensation award an acceptable price. If the price is not acceptable, the government may abandon the proceedings and lift the cloud of condemnation from the property.

Interestingly, in *San Diego Gas & Elec. Co.*, Justice Brennan justified use of his temporary taking theory by analogizing regulatory takings to abandoned condemnation cases:

> "Just as the government may cancel condemnation proceedings before passage of title, [citation], or abandon property it has temporarily occupied or invaded, [citation], it must have the same power to rescind a regulatory 'taking.' As the Court has noted, 'an abandonment does not prejudice the property owner. It merely results in an alteration of the property interest taken — from full ownership to one of temporary use and occupation. . . . In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily.' [Citations.]" (450 U.S. at 658)

Thus, the analogy comes full circle: from the law regarding abandonment of direct condemnation actions, Justice Brennan fashioned a theory of temporary taking for severely restrictive regulations. That view, now clearly expressed by Justice Brennan, supplies the analysis for finding a temporary taking in a direct condemnation case where the lengthy pendency of the action injures the property owner by taking his rights of use and alienation.

Justice Brennan's theory of temporary takings is beginning to be felt in state courts. (*Rippley v. City of Lincoln* [ND 1983] 330 NW 2d 505, 510-511; *Zinn v. State* [Wis. 1983] 334 NW 2d 67, 72-74) It merits application here.

**IF THE GOVERNMENT NEEDS TO FREEZE THE MARKET FOR A PARTICULAR PIECE OF PROPERTY WHILE DECIDING WHETHER TO BUY IT, IT SHOULD DO AS ANY CITIZEN WOULD HAVE TO DO: BUY AN OPTION.**

When the United States says it needs the flexibility provided by 40 USC §257 to permit it to "test the water," determine the price, and then exercise its judgment whether to buy or "back away," it is describing a tool presently available to any potential purchaser in the marketplace: an option. If an individual needs time (be it one year or ten) to decide whether to buy a piece of land, and he wants to ensure that nothing happens to it in the meantime, he buys an option. He *buys* the time needed to think and plan and change his intent. That protects the rights of *both* parties.

By contrast, the scheme established by 40 USC §257, as rigidly interpreted by the Fifth Circuit in the case at bench and by the District Court in Laughlin's case, protects only the government. It *compels* the property owner to *give* the government an option and, when the land is undeveloped, deprives the property owner of any ability to use the property during the "option" period.

Courts are beginning to recognize the appropriateness of the option analogy to governmental actions which freeze the use of property while the government makes up its mind. (E.g., *Lomarch Corp. v. Mayor & Common Council* [NJ 1968] 237 A.2d 881 [designating property on official map as "park" while City decided whether to buy it was the taking of a one year option which required compensation]; *Suess Builders Co. v. City of Beaverton* [Ore 1982] 656 P.2d 306 [regulation freezing use of land while government decided what to do was equivalent to seizure of an option which required compensation]; see

also *6th Camden Corp. v. Evesham Township* [DNJ 1976] 420 F.Supp. 709, 728, fn. 17 [citing *Lomarch* result with approval]; *Maryland-Nat. Capital Park v. Chadwick* [Md. 1979] 405 A.2d 241, 248-249 [discussing *Lomarch* result approvingly].)

The need of government to plan can hardly be denied. However, when such planning effects a taking of private property by depriving the owner of all economically viable use, compensation is mandated.

**WHEN THE USE OF UNDEVELOPED PROPERTY IS STULTIFIED BY THE PENDENCY OF A CONDEMNATION ACTION, INTEREST (AS A PART OF JUST COMPENSATION) SHOULD BEGIN NO LATER THAN THE DATE THE COMPLAINT WAS FILED. IF THE FACTS SHOW INTERFERENCE BEFORE THAT, INTEREST SHOULD BEGIN AT AN EARLIER DATE**

In examining the course of a condemnation action, there are four dates which are capable of confusion if not kept in focus. They are the dates of:

- taking;
- value;
- condition; and
- passage of title.

In any given case, some of these dates may be the same.

*Date of Taking*

As noted earlier, the date of taking is essentially a fact question.

If the Declaration of Taking procedure (40 USC §258a) is used, rather than the "straight" condemnation (40 USC §257) employed at bench, the Declaration may establish the date of taking.

If pre-judgment possession is taken, that may establish a date of taking.

Please note, however, that if possession is not taken until the action has been pending for some time, and other factors have already stultified use of the property, then the date of taking may precede the date of possession.

*Date of Value*

Some date must be given the appraisers (and the trier of fact) for valuing the property, as values change with time.

If the date of taking has clearly preceded the date of trial, that date may also be the date of value. Otherwise, the date of value may be more or less arbitrary, such as the date the complaint was filed, or the date of trial. Though this Court has generally said that the date of value should be the date of taking (*Phelps v. U.S.* [1927] 274 U.S. 341), that general rule may be impossible to apply where the trier of fact must determine the date of taking after reviewing the evidence. Thus, the date of value may or may not also be the date of taking.

*Date of Condition*

It has long been the rule that some activities which occur during property acquisition must be disregarded in determining value. (*U.S. v. Miller* [1943] 317 U.S. 369; 42 USC §4651[3].) Thus, the property is sometimes valued as of its condition on a particular date, disregarding, for example the impact of the acquisition on the property's value. This date of condition may or may not also be the date of taking.

*Date of Passage of Title*

Title passes in one of two ways in a condemnation case, depending on the manner of acquisition chosen by the

government. Under the Declaration of Taking Act (40 USC §258a), title passes at the *beginning* of the condemnation action. In a "straight" condemnation (40 USC §257), like the one at bench, title passes *after* judgment, when compensation is paid.

It is almost universally unrealistic to say that the date of passage of title is the date of taking, though that is just as universally urged by the government and sometimes (as in the Fifth Circuit decision at bench) accepted by courts.

When, as at bench, use of the property is foreclosed years before title passes, it can be nothing short of fiction to use the date of passage of title as the date of taking. One anomaly, noted by Kirby in its brief, is that if the date of passage of title is viewed as the date of taking, then the property owner will *never* receive the value of the property contemporaneous with the taking. (Compare *Phelps v. U.S.* [1927] 274 U.S. 341.) As at bench, the property may have been valued *years before* passage of title. Thus, the date of passage of title may, or may not, be the date of taking.

*Proposed Rule*

Because *none* of the dates noted above will *always* represent the date of taking, none commends itself as the basis for a general rule. All have an element of arbitrariness which is counter to the fundamental precept of fairness underlying the just compensation clause. (Compare *U.S. v. Fuller* [1973] 409 U.S. 488, 490.)

Thus, for this class of cases, where undeveloped land is being condemned, Laughlin recommends a two-step process be used:

- First, the date the complaint is filed be presumed to be the date of taking, as that event generally forecloses use or alienation of undeveloped property.

- Second, if the property owner can produce evidence showing that stultification of use was caused by the government's actions before the complaint was filed, then the date of such stultification is the date of taking.

Such a rule is consistent with both fairness and reality. No one disputes the need for government to plan, and to do so publicly. Indeed, such planning is laudable. However, by the time the complaint is filed, the planning process is at an end. A decision has been made to at least "test the water" and see if the property can be acquired at an acceptable price. From that point on, the property owner can no longer deal with the property as though it were his own. The government has seized at least an option on the property, foreclosing significant use.[5]

The proposed rule acknowledges reality. General use of any of the other dates discussed herein would have as its sole virtue ease of application. The arbitrary results, however, would often be out of harmony with the guarantee of fairness in the just compensation clause.

## CONCLUSION

When a citizen is asked to give up his property for the common weal, the determination of his Constitutionally mandated just compensation is too delicate a matter to be relegated to the whim of either Congress or the bureaucracy. Its touchstones are fairness and equity, matters in which the judiciary is supreme.

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[5]Of course, in cases where the property owner continues to receive income or use the property, then the value of possession should be offset against pre-judgment interest. (See, e.g., Cal. Code Civ. Proc. §1268.330.)

The owner of undeveloped land suffers significantly during the pendency of a condemnation action. In virtually all cases, his ability to use or alienate the property is denied by the condemnation cloud hovering overhead.

During that period, the property is de facto taken, even if neither title nor possession has been transferred.

To preserve the government's planning flexibility while protecting the property rights of innocent landowners, it seems Constitutionally appropriate to view the filing of a condemnation complaint against undeveloped property as a temporary taking.

If, after the property is valued, the government decides not to buy it, the property owner would be paid for the temporary taking by awarding interest on the amount of the judgment from the filing of the complaint until abandonment of the taking. If the government completes the property acquisition, the temporary taking would become permanent. Such a result would give the government what it wants (the opportunity to decide whether to acquire the property) while acknowledging the real economic impact of such action on the property owner. Fairness calls for that.

Respectfully submitted,
DONALD L. WOOD
and
JERROLD A. FADEM
MICHAEL M. BERGER
FADEM, BERGER & NORTON

By: MICHAEL M. BERGER
Attorneys for Amicus Curiae
Laughlin Recreational Enterprises, Ltd.

**PROOF OF SERVICE BY MAIL**

*State of California*

*ss.*

*County of Los Angeles*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405; that on December 22, 1983, I served the within *Brief of Amicus Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

United States Supreme Court
1 First Street, N.W.
Washington, D.C. 20543
*(Original and 40 copies)*

Rex E. Lee
Solicitor General
United States Department
of Justice
Washington, D.C. 20530

Joe G. Roady
3700 First City Tower
Houston, Texas 77002

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 22, 1983, at Santa Monica, California.

Kirk W. Harney
*(Original signed)*